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News & Types: Immigration Update

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Practices: Immigration

LAW EXTENDING OPT PERIOD FOR STEM STUDENTS VACATED

The U.S. District Court for the DC District vacated the rule that allows STEM students in F-1 status to extend their post-graduation Optional Practical Training (OPT) employment authorization for 17 months if they are working for an employer registered with the E-Verify Program. To avoid hardship to thousands of foreign students currently present and working pursuant to this rule, the District Court postponed the invalidation of the rule for six months, until February 12, 2016. According to the District Court, when issuing the rule in 2008 the US Department of Homeland Security (DHS) did not comply with the normal rulemaking process requiring the agency to issue a notice and allow for a certain period for public comment. Further, after the issuance of the initial rule, the DHS has continued to add more qualifying fields of study without going through the normal rulemaking process.

The DHS issued the rule in 2008 pursuant to emergency rulemaking provisions that allow an agency to issue rules for good cause without public notice and comment. The justification was that unless the rule was issued, thousands of foreign students who were unable to secure an H-1B work visa would have to leave the United States. This is due to several factors. First, the majority of foreign students will only qualify for the H-1B work visa. Second, the H-1B visa is subject to an annual quota that is generally met the first week it opens. Due to this oversubscription, many foreign students were not able to secure an H-1B visa before their one-year period of OPT work authorization expired. The DHS argued that the rule was necessary to allow these foreign students multiple opportunities to secure an H-1B work visa for several years.

What happens now? The hope is that the DHS will be able to issue a new rule for public comment as soon as possible to ensure that another provision is in place by February 12, 2016. E-Verify employers who directly employ STEM students working on their 17-month extension or employers that employ these individuals through contractors should continue to monitor the situation.

L-1B POLICY MEMORANDUM EFFECTIVE 8/31/2015

The US Citizenship and Immigration Services (USCIS) finalized the L-1B Intracompany Transferee Visa adjudications memorandum that was released for comments in March 2015, which will be effective as of August 31, 2015. The memo was part of the series of executive actions on immigration that President Obama announced in November 2014 with the goal of giving L-1B employers more clarification and guidance on L-1B approval standards. The L-1B classification permits foreign workers with specialized knowledge to be transferred to the United States to work at a U.S. entity that is affiliated with the worker's foreign employer.

The L-1B program has been one of the most controversial and unpredictable work visas due to a lack of clear guidance on what constitutes "specialized knowledge" and a variety of memoranda that USCIS officers frequently indicate that they are under no obligation to respect. This translates into inconsistent adjudications and general unpredictability for L-1B employers. Nothing exemplifies this more than the Fogo de Chao case that was decided in October 2014 by the U.S. Court of Appeals for the DC Circuit. The case stemmed from a 2010 denial by the USCIS Vermont Service Center of an L-1B petition filed by the Brazilian-themed Fogo de Chao chain of steakhouses for a gaucho chef. Prior to the denial of the company's L-1B petition for this worker, the USCIS had approved over 200 petitions for gaucho chefs from 1997 to 2006.

Unfortunately the Fogo de Chao case is not an isolated case and instead demonstrates how the L-1B program suffered from the Great Recession. As U.S. workers lost their jobs, it became increasingly difficult for U.S. companies to transfer foreign workers to the United States. A report released in March 2014 by the National Foundation for American Policy, a non-profit, non-partisan research organization noted that the USCIS had denied 34 percent of L-1B petitions in Fiscal Year 2013, up from six percent in Fiscal Year 2006 although no new laws had been enacted. The report also showed the steep jump in the issuance of Requests for Evidence (RFE). The USCIS rate, which had been at 10 percent, rose abruptly in 2008 to almost 50 percent. Remarkably, the figure continued to climb to 63 percent in fiscal year 2011 and remained at a robust 43 percent and 46 percent for fiscal years 2012 and 2013, respectively. Certain countries and industries were more adversely affected than others, for example, petitions requesting L-1B status on behalf of Indian nationals had a denial rate of 0.9 percent in fiscal year 2007 rising to 22.5 percent in fiscal year 2009.

The purpose of the L-1B memo is to consolidate agency guidance, clarify the evidentiary standard and more clearly delineate what constitutes "specialized knowledge." First, the memo summarizes the legal framework and history of the L-1B program clarifies that it is consistent with all previously issued agency memoranda, thereby rescinds the four major L-1B memos previously issued by the USCIS from 1994 to 2005 by agency directors James A. Puleo, Fujie Ohata and William R. Yates. Second, the memo reminds USCIS officers that the evidentiary standard is "by a preponderance of the evidence," i.e., "more likely than not" rather than "clear and convincing" or "beyond a reasonable doubt." Third, the memo provides a series of factors that presumably will assist USCIS adjudicators and employers in determining what is "specialized knowledge" and what a U.S. employer does not have to demonstrate in order to be successful in obtaining an L-1B visa. Fourth, the memo clarifies that the L-1B visa does not require that the knowledge be proprietary or unique to the U.S. organization, be narrowly held within the U.S. employer, require a test of the U.S. labor market or that the worker only qualify under the L-1B visa and no other nonimmigrant visa. Fifth, the memo reiterates the two-part test of the L-1 Visa Reform Act for workers that will be employed off-site. Specifically, an unaffiliated employer cannot primarily control and supervise the worker and the worker must be employed "in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary." Lastly, the memo clarifies that when a U.S. employer is requesting an extension of L-1B status where the facts of the case remain unchanged, the USCIS should defer to the prior approval. The USCIS should only re-examine eligibility when there is a finding of material error, a substantial change since the prior approval or new material information that is adverse to the petitioner or the worker's eligibility.

It remains to be seen how USCIS adjudicators will apply the memo and whether U.S. petitioning employers will be able to secure consistent adjudications.